

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**JOLYNN MARIE DENNIS, and
DAVID ALLEN DENNIS,**

Debtors.

Case No. **04-63822-13**

**DAVID ALLEN DENNIS, and
JOLYNN MARIE DENNIS,**

Plaintiffs.

-VS-

Adv No. **05-00036**

**TEX CATES, DAVID BROWN, LINDA
BROWN, GOLDEN YEARS COUNTRY
LIVING, INC., PATTY STEVENS, and
LAMBROS REALTY,**

Defendants.

TEX CATES,

Third-Party Plaintiff,

-VS-

ALAN F. BLAKELY,

Third-Party Defendant.

MEMORANDUM OF DECISION

At Butte in said District this 16th day of June, 2005.

In this adversary proceeding, which was removed from the Montana Fourth Judicial

District Court, Missoula County, Case No. DV-01-405 (hereinafter the “state court action”) by the Plaintiffs/Debtors Jolynn Dennis and David Dennis by Notice of Removal filed on March 29, 2005, after due notice hearing was held at Missoula on June 2, 2005, on the “Motion for Abstention from Removal or Remand” filed by Defendant Tex Cates (“Cates”), and Plaintiffs’ objection thereto. Cates was represented at the hearing by attorney Quentin H. Rhoades (“Rhoades”). Plaintiffs were represented by attorney Harold V. Dye (“Dye”), and Plaintiffs’ attorney David McLean (“McLean”) of Browning, Kaleczyc, Berry & Hoven, P.C. (the “Browning firm”), which was employed as special counsel by the Debtors to pursue their action against Cates in the state court action, testified. Also appearing were attorneys Geoffrey Angel (“Angel”) for Third-Party Defendant Alan F. Blakely (“Blakely”), and Kevin Twidwell for Defendants Patty Stevens and Lambros Realty (“Lambros”). No exhibits were admitted. At the conclusion of the parties’ cases-in-chief the Court took the matter under advisement. After review of the record and applicable law, for the reasons set forth below the Court will grant Cates’ Motion to Remand by separate Order, and remands this adversary proceeding to the Montana Fourth Judicial District Court, Missoula County, Case No. DV-01-405.

This Court has jurisdiction of this adversary proceeding under 28 U.S.C. § 1334(b), but Debtors admit that the Court’s jurisdiction is “related to” their Chapter 13 case. Plaintiffs’ claims for relief asserted against Cates in this adversary proceeding are non-core proceedings under 28 U.S.C. § 157 (c)(1).

Cates’ motion seeks abstention from removal, or in the alternative requests that this Court remand this adversary proceeding back to state court on grounds of comity with the state court and because the state court is better able to determine state law issues. On procedural grounds

Cates argues that the Notice of Removal was defective because it was not accompanied by the pleadings¹, and that the other defendants Linda Brown and David Brown have not been properly served with the second amended complaint.

Plaintiffs respond that the other defendants have been defaulted or disappeared. Plaintiffs agree their claims for relief are non-core matters involving state law claims, but argue that this Court is competent to decide the state law issues without offending comity. Debtors argue that Cates is responsible for the delay in trying their claims in state court.

FACTS

Plaintiffs initiated this action in state court on May 29, 2001, averring claims for relief against Cates for negligent misrepresentation and constructive fraud² and including a demand for jury trial. Cates filed an answer and affirmative defenses on August 1, 2001, denying liability. The defendants Brown and Golden Years County Living were defaulted May 15, 2002, according to McLean's testimony and the court file (No. 14). District Judge Hon. Ed McLean scheduled a pretrial conference on July 11, 2002, but that was vacated.

Plaintiffs' original attorney was allowed to withdraw as attorney of record on January 8, 2003. An amended complaint was filed by Plaintiffs on January 9, 2003, adding a claim for negligence against defendants Patty Stevens and Lambros. David McLean was substituted as Plaintiffs' attorney on January 21, 2003. After Cates filed his answer to the amended complaint, Judge McLean withdrew and Hon. Douglas G. Harkin accepted jurisdiction on February 3, 2003. Cates filed a motion to compel discovery, on which Judge Harkin reserved ruling and directed

¹The pleadings from the state district court were received on June 2, 2005.

²An actual fraud claim was against Browns only.

that a scheduling order be issued, by order and memorandum entered March 17, 2003 (No. 52), which also noted this litigation was not proceeding in a timely fashion. A scheduling order was filed April 11, 2003.

Cates filed a third-party complaint against Blakely on April 11, 2005 (No. 56.5). Plaintiffs filed a second amended complaint on June 30, 2003, adding claims against defendants including Cates for negligence, negligent and/or intentional infliction of emotional distress, and unfair and deceptive practices³, including a request for punitive damages. Cates answered the second amended complaint denying liability.

Blakely moved to dismiss the third-party complaint. By order and memorandum entered November 6, 2003 (No. 91), Judge Harkin granted Cates' motion to compel discovery and granted Blakely's motion to dismiss Cates' third-party complaint. Judge Harkin noted that discovery had closed under his prior scheduling order, and Plaintiffs had failed to take action by sending Cates supplemental discovery requests. The judge wrote that Cates is entitled to attorney fees for the motion to compel⁴. On November 12, 2003, the court entered an amended scheduling order superceding the prior order, and stated that discovery shall be completed by March 1, 2004. However, that amended scheduling order also was later vacated by the court by order entered January 8, 2004 (No. 99) granting Cates' "Unopposed Motion to Vacate Amended Scheduling Order" which stated: "Counsel for all remaining parties have discussed these issues and agree that the Amended Scheduling Order should be vacated"

³Count VII alleging unfair and deceptive practices was dismissed against Cates, Patti Stevens and Lambros by order and memorandum filed September 13, 2003.

⁴Plaintiffs objected (No. 97) to Cates' request for attorney fees (No. 95), and that matter remains pending.

On November 25, 2003, Cates moved to certify dismissal of his third-party complaint to the Montana Supreme Court under Mont. R. Civ. P. 54(b). On January 22, 2004, the court granted Cates' motion for Rule 54(b) certification. Cates moved to vacate and reconsider that order, but his motion was denied (No. 107). Cates filed a notice of appeal of the dismissal of his third party complaint against Blakely on May 28, 2004.

While Cates' appeal was pending, the Plaintiffs filed their voluntary Chapter 13 petition on December 29, 2004, and filed their Schedules and Statements on January 6, 2005, listing assets of \$289,570.00 and liabilities in the amount of \$1,355,012.48. Schedule B lists no lawsuits, but the Statement of Financial Affairs includes at number 4 a pending professional negligence claim in the Missoula County District Court, No. DV-01-405. Schedule F does not list Cates as a creditor⁵.

Debtors filed an application to employ Browning, Kaleczyc, Berry & Hoven, P.C., as special counsel to pursue the state court action, which was approved by Order entered January 12, 2005. On March 29, 2005, Dye filed on behalf of the Debtors/Plaintiffs the Notice of Removal of the state action to this Court. Cates moved for abstention or remand on April 7, 2005. On April 26, 2005, the Montana Supreme Court filed its decision affirming Judge Harkin's dismissal of Cates' third party complaint against Blakely.⁶ At hearing, Blakely's attorney Angel raised the question of Blakely's entitlement to fees and costs following dismissal

⁵The state court has not awarded Cates any attorney fees to this Court's knowledge, although it stated Cates is entitled to attorney fees against Debtors on his motion to compel.

⁶The issue of whether Cates' appeal to the Montana Supreme Court was subject to the automatic stay of 11 U.S.C. § 362(a) is not before this Court, and need not be addressed or decided except to note that neither Cates nor Blakely are debtors, and there is no suggestion that Cates' third-party complaint against Blakely was property of the estate.

of Cates' third-party complaint.

Debtors' amended Chapter 13 Plan was confirmed with the Trustee's consent, by Order entered May 25, 2005. The confirmed Plan provides for 38 months of plan payments. At the hearing, Debtors' counsel Dye stated that the litigation against Cates is not completely essential to their reorganization, but if successful the litigation would allow the Debtors to pay their creditors in full. Dye stated they removed the case because of extensive delay, and stated that the litigation is not very far along because of procedural maneuvers. McLean testified that the state court action was idle during the appeal. McLean admitted that Judge Harkin is competent to hear and decide the issues in the state court action, but did not know the status of the Court's trial docket and gave his opinion that the state courts have difficulties setting trial dates.

DISCUSSION

Cates moves for abstention or remand, questioning whether this Court has jurisdiction. Plaintiffs admit the Court's jurisdiction of this adversary proceeding is no more than "related to" jurisdiction under § 1334(b), and that it involve non-core proceedings. As such, and Cates not having consented under § 157(c)(2), this Court's task if it denies Cates' motion is to submit proposed findings of fact and conclusions of law with respect to the non-core proceeding to the federal district court for consideration pursuant to § 157(c)(1).

Discretionary abstention is governed by 28 U.S.C. § 1334(c)(1), which provides: "Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." *In re General Carriers Corp.*, 258 B.R. 181, 189-190 (9th Cir. BAP 2001). "[A]bstention provisions implicate

the question whether the bankruptcy court should exercise jurisdiction, not whether the court has jurisdiction in the first instance.... The act of abstaining presumes that proper jurisdiction otherwise exists." *In re General Carriers Corp.*, 258 B.R. at 190, quoting *In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 708 (2nd Cir.1995); *In re Lewis*, 20 Mont. B.R. 364, 368 (Bankr. D. Mont. 2003).

In *Lewis* this Court cited controlling authority for the following proposition on abstention:

In *Security Farms v. International Brotherhood of Teamsters*, 124 F.3d 999 (9th Cir.1997), however, the Ninth Circuit noted that "[a]bstention can exist only where there is a parallel proceeding in state court." *Id.* at 1009. Section §1334(c) abstention should be read *in pari materia* with 28 U.S.C. § 1452(b) remand, so that § 1334(c) applies only in those cases in which there is a related proceeding that either permits abstention in the interest of comity, section 1334(c)(1), or that, by legislative mandate, requires it, section 1334(c)(2). *Id.* at 1010; *In re Lazar*, 237 F.3d 967, 981 (9th Cir. 2001). A decision to abstain or not to abstain is not reviewable by appeal. § 1334(d); *see also*, *Security Farms*, 124 F.3d at 1009-10 & n. 7; *In re Lazar*, 237 F.3d at 982.

Lewis, 20 Mont. B.R. at 369.

The Ninth Circuit distinguished the concept of remand in *Security Farms*, 124 F.3d at 1010:

28 U.S.C. § 1452(b) . . . provides district courts with the authority to remand civil actions properly removed to federal court, in situations where there is no parallel proceeding.

* * * *

The International removed this action to federal court pursuant to 28 U.S.C. § 1452(a), the Bankruptcy Code's analog to the general statutory provision governing removal, 28 U.S.C. § 1441. Thus, a decision not to remand this case comes within the proscriptive language of section 1452(b), which provides in relevant part:

An order entered under this subsection remanding a claim or cause of action, or a decision not to remand, is not reviewable by appeal or

otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title....

(Emphasis added). *See also* [*Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, at 131-32, 116 S.Ct. 494, at 498-99, 133 L.Ed.2d 461 (1995)] (Ginsburg, J., concurring) ("... [28 U.S.C.] § 1452(b) independently warrants the judgment that remand orders in bankruptcy cases are not reviewable"). The purpose of section 1452 is to enlarge a trial court's power to remove or remand a claim related to a bankruptcy case. *See Things Remembered*, 516 U.S. at [132-32], 116 S.Ct. at 499 (Ginsburg, J., concurring). Section 1452(b) therefore bars our exercise of appellate jurisdiction over this aspect of Growers' appeal.

124 F.3d at 1010. In the instant case Cates contends removal was not proper and so the Court should abstain or remand. The result under either approach is the same.

The Court decides whether to remand pursuant to 28 U.S.C. § 1452(b), which broadly provides a court power to remand a removed claim or cause of action related to a bankruptcy case "on any equitable ground". § 1452(b); *Things Remembered*, 516 U.S. at 131-32, 116 S.Ct. at 498-99. Such equitable ground may include a holding that the entire action should be tried in the same court if a civil action has been bifurcated; a holding that a state court is better able to respond to a suit involving questions of state law and other comity considerations; and other equitable considerations. *In re Long Neck, Ltd*, 107 B.R. 479, 482 (Bankr. Del. 1988); *Things Remembered, Inc. v. BGTV, Inc.*, 151 B.R. 827, 830-31 (Bankr.N.D.Ohio Mar 15, 1993); *see also* 1 Lawrence P. King, *Collier on Bankruptcy*, ¶ 3.07[5] (15th ed. 1998).

Upon review of the record and equitable considerations this Court concludes that remand is appropriate, and the Court remands this adversary proceeding under § 1452(b) to the Montana Fourth Judicial District Court, Missoula County, Cause No. DV-01-405. Dye admitted at hearing that this adversary proceeding is not necessary for the Debtors' reorganization. Their Plan has been confirmed with a term of 38 months, which should be sufficient time for the litigation to

proceed to finality.

The Court reviewed the state court file. The Court disagrees that the state court let the case sit idle, and disagrees that the delay was solely due to Cates' procedural delays and dilatory tactics. Above is set forth in detail the state court proceedings showing that scheduling orders were entered and discovery went forward. In fact at one point the court deemed discovery closed. Rather than Cates, the state court found that Plaintiffs failed to take required action to supplement their discovery responses. Plaintiffs did not oppose the most recent request to vacate scheduling order. Plaintiffs have filed 3 complaints over a period of 2 years.

All of Plaintiffs' claims for relief are based on state law, which the state court is competent and capable of hearing and deciding. Plaintiffs' claims include a demand for jury trial of all issues, for which the state court is perhaps more appropriate. Outstanding issues of the amount of Cates' attorney's fees to award for discovery abuse, and Blakely's claim for attorney's fees against Cates, stretch "related to" jurisdiction to its outer limits.

Finally, the Court sees no reason to agree with McLean's testimony that the state court has difficulty setting a trial date. It was the parties, not the trial judge, who have repeatedly requested relief from scheduling orders entered by the court. The state court concluded that Plaintiffs, not Cates, were dragging their feet in discovery.

All things considered, this Court deems it appropriate to grant Cates' motion to remand on equitable grounds, comity considerations, and as a more efficient use of scarce judicial resources.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this adversary proceeding under 28 U.S.C. § 1334(b), as

it is related to the Debtors' Chapter 13 case under title 11, U.S.C.

2. Plaintiffs' claims for relief asserted against Cates in this adversary proceeding are non-core proceedings related to the Debtors' Chapter 13 bankruptcy case under 28 U.S.C. § 157(c)(1) and 28 U.S.C. § 1334(b).

3. The Court concludes that it is appropriate in the interest of comity with the State court and respect for State law, on equitable grounds, and to preserve scarce judicial resources, to remand Plaintiffs' removed claims in this adversary proceeding to the Montana Fourth Judicial District Court, Cause No. DV-01-405, pursuant to its broad authority under 28 U.S.C. § 1452(b).

IT IS ORDERED a separate Order shall be entered in conformity with the above overruling the Plaintiffs' objection, granting Defendant Cates' motion for remand, and remanding this adversary proceeding to the Montana Fourth Judicial District Court, Cause No. DV-01-405, pursuant to 28 U.S.C. § 1452(b) for further proceedings.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana